

[ORAL ARGUMENT HELD DECEMBER 13, 2018]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ESTATE OF KLIEMAN, et al.,

Plaintiffs-Appellants,

v.

PALESTINIAN AUTHORITY, et al.,

Defendants-Appellees.

No. 15-7034

**UNITED STATES' RESPONSE TO FEBRUARY 6, 2019 ORDER AND,
IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO
FILE AMICUS BRIEF**

The United States files this response to the Court's February 6, 2019 Order to inform the Court that neither the "accepts" nor "continues to maintain" provisions of Section 4 of the Anti-Terrorism Clarification Act of 2018 (ATCA), have been satisfied. Section 4 thus does not operate to "deem[]" defendants to have consented to personal jurisdiction in this case, and this Court therefore need not address Section 4's constitutionality.

The United States respectfully submits that the Court should resolve the antecedent issue of whether the ATCA's factual predicates are satisfied before requesting the United States' views on the constitutional issue.

Should the Court still invite the views of the United States on the constitutional issue, however, the United States respectfully moves for a two-week extension of time, until March 13, 2019, to file an amicus brief, if authorized by the Solicitor General. The reasons for this request are set forth below.

1. Section 4 of the ATCA, Pub. L. No. 115-253, codified at 18 U.S.C. § 2334(e), provides that a defendant will be "deemed to have consented to personal jurisdiction" in a civil Anti-Terrorism Act case if, after the date that is 120 days after the enactment of the statute (i.e., January 31, 2019), the defendant (1) accepts specified forms of assistance under the Foreign Assistance Act of 1961, or, (2) "in the case of a defendant benefiting from a waiver or suspension of section 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. § 5202)," the defendant "continues to maintain" or "establishes"

“any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States.” 18 U.S.C. § 2334(e)(1).

2. On December 19, 2018, the Court invited the United States to file an amicus brief addressing whether Section 4 of ATCA is constitutional. The Court’s order directed the United States to “assume that the ‘accepts’ and or ‘continues to maintain’ provisions of Section 4 will be satisfied ‘after the date that is 120 days after the date of enactment’” of the ATCA. *See* Dec. 19, 2018 Order.

On February 6, 2019, the Court instructed the parties to file supplemental briefs “updating their views on the current applicability of Section 4,” including whether the ‘accepts’ and/or ‘continues to maintain’ provisions have been satisfied.” *See* Feb. 6, 2019 Order. The Court also instructed the parties’ supplemental briefs to address the views presented in the United States’ amicus brief, due February 27, 2019. *Id.*

3. The United States writes to inform the Court that, as of February 1, 2019, and continuing to the present, the “accepts” and “continues to maintain” provisions of the ATCA are not satisfied.

First, as of February 1, 2019 and at all times since, defendants have not accepted foreign assistance provided under the legal authorities specified in Section 4. On December 26, 2018, the “Government of Palestine,” which the United States understands to be speaking on behalf of defendants,¹ sent a letter to the State Department explicitly declining to accept the forms of foreign assistance enumerated in Section 4. *See* Ex. 1, Letter from Rami Hamdallah to U.S. Dep’t of State (Dec. 26, 2018). Consistent with this request, the State Department ended all such assistance to the Palestinian Authority prior to February 1, 2019. *See* Ex. 2, Letter from the U.S. Dep’t of State to Rami Hamdallah (Jan. 29, 2019). The State Department does not provide assistance under any of the foreign assistance authorities enumerated in section 4 to the Palestine Liberation Organization (PLO). Section 4’s “accepts” provision is thus not satisfied.

Second, defendants do not currently “benefit[]” from a waiver of section 1003 of the Anti-Terrorism Act of 1987, including to “continue[] to

¹ While the United States does not recognize a Palestinian state, the Department of State recognizes this letter as having been sent by the PA. Assistance is not provided to the PLO.

maintain” “any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States” pursuant to such a waiver. 22 U.S.C. § 2334(e)(1)(B). Section 1003 makes it unlawful for the PLO “or any of its constituent groups” to “establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States.” 22 U.S.C. § 5202. The Executive Branch has historically issued waivers of section 1003 on a six-month basis, permitting the PLO to maintain an office of the General Delegation of the PLO in Washington, DC.² *See, e.g.*, Ex. 3, May 8, 2017 Waiver. The last waiver issued by the State Department expired in 2017, however, *id.*, and the State Department announced in 2018 that in the absence of a waiver, the PLO’s office in Washington D.C. must close because “the PLO has not taken steps to advance the start of direct and meaningful negotiations with

² *See* Jim Zanotti, *The Palestinians: Background and U.S. Relations*, Cong. Research Serv. Rep. RL34074, at 4 (Nov. 21, 2018) (describing history of waivers); *see also, e.g.*, Waiver and Certification of Statutory Provisions Regarding the Palestine Liberation Organization Office (Apr. 10, 2013), 78 Fed. Reg. 25,780 (May 2, 2013).

Israel,” and has “refused to engage with the U.S. government with respect to peace efforts and otherwise.”³ There is no waiver of section 1003 currently in effect, and the PLO’s Washington office closed as of October 10, 2018. *See* Ex. 5, Letter from U.S. Dep’t of State to Chief Representative, General Delegation of the PLO (Sept. 10, 2018).

The PLO continues to maintain its United Nations Observer Mission in New York. The PLO’s maintenance of that office, however, could not fall within the terms of the ATCA, as there is no current waiver of section 1003. Since the enactment of section 1003, courts have held that its prohibition “does not apply . . . to the PLO’s Mission in New York.” *See, e.g., Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro*, 937 F.2d 44, 46 (2d Cir. 1991); *United States v. PLO*, 695 F. Supp. 1456, 1464–71 (S.D.N.Y. 1988). The Executive Branch does not issue waivers of

³ *See* U.S. Dep’t of State, *Closure of the PLO Office in Washington* (Sept. 10, 2018), <https://www.state.gov/r/pa/prs/ps/2018/09/285812.htm>. *See also* Ex. 4, Letter from the U.S. Dep’t of State to Chief Representative, General Delegation of the PLO (Nov. 17, 2017).

section 1003 to permit the PLO to maintain its New York Observer Mission.

Section 4's "continues to maintain" provision is thus not satisfied.

In sum, as of February 1, 2019 and since that date, defendants have not accepted any of the foreign assistance provided under the authorities enumerated in Section 4, and they do not currently "benefit[]" from a waiver of section 1003 of the Anti-Terrorism Act of 1987, including to maintain an office in the United States pursuant to such a waiver. Based on the facts of which the government is aware, there is no need for a remand to the district court. This Court can determine that the ATCA's statutory predicates are not satisfied, and thus Section 4 does not operate to "deem" the PA/PLO to have consented to personal jurisdiction in this case.

Accordingly, this Court need not address the constitutionality of the statute. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (noting that courts generally avoid deciding constitutional cases unnecessarily especially when "judging the constitutionality of an Act of Congress"); *Nat'l Black Police Ass'n v. Dist. Of Columbia*, 108 F.3d 346, 353 (D.C. Cir. 1997) ("[I]t is a well-established principle that courts should

avoid unnecessarily deciding constitutional questions.”). The Court should particularly avoid unnecessarily addressing the constitutional issue here, as it arises in the context of the conduct of foreign relations. The United States respectfully submits that the Court should resolve the antecedent issue of whether the ATCA’s factual predicates are satisfied before requesting briefing on the constitutionality of Section 4 of the ATCA.

4. Should this Court still request the views of the United States on the constitutionality of Section 4, however, the United States respectfully requests a two-week extension of the February 27, 2019 deadline, until March 13, 2019 to file an amicus brief, if authorized by the Solicitor General.

This Court invited the United States’ amicus participation on December 19, 2018. On December 21, 2018, the appropriations act that had been funding the Department of Justice expired and appropriations to the Department lapsed. Department of Justice attorneys were prohibited from working, even on a voluntary basis, except in very limited circumstances,

including “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342.

Appropriations were temporarily restored on January 25, 2019, permitting the Department’s furloughed attorneys to resume their duties. The protracted shutdown created a significant backlog of litigation tasks for the Department and other affected agencies. Many briefing and other litigation deadlines that were extended by this Court and other courts during the shutdown are currently scheduled to come due shortly. At the same time, deadlines in many other cases that were not extended during the shutdown are now impending. As a result, the number of litigation deadlines that must be met in the next several weeks, and the volume of work required to meet those deadlines, have effectively been multiplied by the shutdown. In addition, due to the shutdown, the United States was unable to meet with the parties until February 6, 2019.

The United States is engaged in the interagency consultation and deliberation necessary for the Solicitor General to decide whether to authorize amicus participation by the United States in this case and, should

participation be authorized, the arguments to be made on behalf of the United States. A brief additional delay of the briefing time for an amicus brief, should one be authorized, will allow this process to be completed in time for the preparation of any amicus brief addressing the constitutionality of the statute.

The United States therefore respectfully moves for a two-week extension, until March 13, 2019, to file an amicus brief addressing the constitutionality of the statute, should the Court still invite the United States to address it and should such a brief be authorized. Counsel for plaintiffs and defendants consent to this extension request. If the deadline for the United States' brief is extended, the deadline for the parties' response briefs should also be extended by a commensurate length.

Respectfully submitted,

SHARON SWINGLE
(202) 353-2689

/s/ Courtney L. Dixon
COURTNEY L. DIXON
(202) 353-8189

Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 7243
Washington, D.C. 20530

FEBRUARY 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Courtney L. Dixon

COURTNEY L. DIXON

EXHIBIT 1



State of Palestine
Office of the Prime Minister

Protocol

26th Dec 2018

Attention:
Mr. Mike Hankey
United States Consulate General – Jerusalem

Note Verbale

The Protocol Department of the Office of the Prime Minister presents its compliments to the Consulate General of the United States in General and has the honour to enclose a letter from H.E Prime Minister / Minister of Interior Dr. Rami Hamdallah to H.E Secretary of State Mr. Michael R. Pompeo.

The Protocol Department avails itself to this opportunity to present its seasons' greetings to the Consulate General of the United States.



State of Palestine

Prime Minister



دولة فلسطين

رئيس الوزراء

Ramallah, December 26th, 2018

His Excellency
Mr. Michael R. Pompeo
Secretary of State
U.S. Department of State
Washington, D.C.
United States of America

Re: United States Aid to Palestine; Anti-Terrorism Clarification Act of 2018

Dear Mr. Secretary of State,

I am writing in connection with the aid received by the Government of Palestine from the United States of America.

The Government of Palestine is, and always will be, grateful for the past economic support of the American people. Augmenting Palestine's own financial resources and support from other nations, the U.S. assistance has facilitated the growth of robust governmental institutions and capacity in Palestine for the benefit of the Palestinian people, and has supported peace and stability for Palestine and its neighbors. The bond between the Palestinian and American people will always be strong.

Regrettably, however, the U.S. economic aid to Palestine now has become a dividing force due to the Anti-Terrorism Clarification Act of 2018 ("ATCA"). As you may know, the ATCA references various forms of U.S. assistance to the Government of Palestine. Further, the ATCA purports to alter the rules of jurisdiction over the Government of Palestine in the U.S. legal proceedings if it continues to accept such aid after January 31, 2019.

12w

State of Palestine

Prime Minister



دولة فلسطين

رئيس الوزراء

The Government of Palestine takes seriously its commitment to respond to all claims of jurisdiction over it in legal proceedings in the U.S. Judicial Branch. The U.S. courts, in turn, have consistently held that “general jurisdiction” of the type discussed in the ATCA cannot be exercised over the Palestinian National Authority and its agencies.

In the view of the Government of Palestine, the U.S. Judicial Branch has sole cognizance over these issues because they involve rights protected by the Constitution of the United States of America. Unfortunately, the ATCA has sought to convert these constitutional issues into political ones.

In light of these developments, the Government of Palestine respectfully informs the United States Government that, as of January 31st, 2019, it fully disclaims and no longer wishes to accept any form of assistance referenced in ATCA. Let there be no misunderstanding on this point. The terms of ATCA envision that the Government of Palestine will make a choice whether or not to accept U.S. “assistance, however provided” after January 31, 2019, under the referenced Foreign Assistance programs. The Government of Palestine unambiguously makes the choice not to accept such assistance.

The ATCA does not include any such aid within its scope; in any event, the intent of the Government of Palestine is to forego any aid within the scope of ATCA. For the avoidance of doubt, the Government of Palestine, including the Palestinian National Authority and its agencies, does not undertake or accept any responsibility for any public or private aid from U.S.-affiliated sources that is or may be provided directly, or indirectly by any third party, to any non-governmental Palestinian institution (including civil society or private sector) on or after January 31, 2019.

As noted previously, the U.S. courts have consistently held that the Government of Palestine is not subject to “general jurisdiction” in U.S. litigation. Because those decisions are rooted in due process protections found in the U.S. Constitution, the ATCA (whatever its intent and purport) cannot support an exercise of the general jurisdiction of the U.S. courts over the Palestinian National Authority and its agencies.

RW

State of Palestine

Prime Minister

دولة فلسطين

رئيس الوزراء

It is unfortunate that the ATCA politicized these issues, which properly belonged within the sole province of the U.S. courts. But, now that the ATCA has done so, the Government of Palestine is constrained to respond as set forth herein. Naturally, if circumstances change, such that Palestine's acceptance of aid under these programs could not be used to undermine due process protections for Palestine in the U.S. courts, then the Government of Palestine would revisit its decision and would take the steps to restore these aid programs, which have a proven track record of success.

Sincerely,

Rami Hamdallah

Prime Minister

CC. H.E. Mr. Shukry Bishara, Minister of Finance and Planning, Ramallah

EXHIBIT 2

**United States Department of State***Washington, D.C. 20520*

January 29, 2019

Dear Prime Minister Hamdallah:

I write in response to your letter, dated December 26, 2018, informing the U.S. government that the Palestinian Authority and its agencies have chosen not to accept U.S. assistance under the authorities referenced in section 4 of the Anti-Terrorism Clarification Act of 2018 (ATCA) after January 31, 2019. Accordingly, I write to confirm that the Department of State and USAID are taking the necessary steps to terminate such assistance by that date. The Department strongly urges the Palestinian Authority and Palestine Liberation Organization to engage with U.S. victims of terrorism and appropriately address their claims for just compensation for their injuries.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Satterfield', written over the printed name.

David M. Satterfield
Assistant Secretary, Acting

EXHIBIT 3

Waiver
of Section 1003 of Public Law 100-204
regarding
the Palestine Liberation Organization Office

Pursuant to the authority vested in me as Under Secretary of State for Political Affairs, including by section 7041(j)(2)(B)(i) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L. 114-113), as carried forward by the Continuing Appropriations Act, 2017 (Div. C, 114-223), the Delegation of Authority in the President's Memorandum of July 21, 2010, and Department of State Delegation of Authority No. 413, I hereby determine and certify that the Palestinians have not, since November 16, 2016: obtained in the United Nations or any specialized agency thereof the same standing as member states or full membership as a state outside an agreement negotiated between Israel and the Palestinians; or taken any action with respect to the International Criminal Court (ICC) that is intended to influence a determination by the ICC to initiate a judicially authorized investigation, or to actively support such an investigation, that subjects Israeli nationals to an investigation for alleged crimes against Palestinians. I therefore waive the provisions of section 1003 of the Anti-Terrorism Act of 1987 (title X of Public Law 100-204).

This waiver shall be effective for a period of six months.

This determination shall be reported to the Congress promptly and published in the Federal Register.

5/18/2017
Date

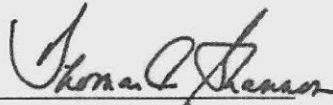

Thomas A. Shannon
Under Secretary of State
Political Affairs

EXHIBIT 4



United States Department of State

*Office of Foreign Missions**Washington, D.C. 20520*

November 17, 2017

REF 17-1874

Mr. Husah Zumlot
Chief Representative
General Delegation of the Palestine Liberation Organization
1732 Wisconsin Ave
Washington, DC 20007

Dear Mr. Zumlot:

On behalf of the Department of State, I am writing to inform you that the waiver of statutory restrictions on the Palestine Liberation Organization (PLO) office signed on May 18, 2017, has lapsed.

The Department of State, exercising its authority under the Foreign Missions Act, set forth terms for operation of the office of the General Delegation of the PLO in its letter to Mr. Hasan Abdel Rahman of June 22, 1994 and Ms. Sincavage's letter to Mr. Areikat of May 15, 2009. In these letters, the Department indicated that the Office would be permitted to operate consistent with section 1003 of the Anti-Terrorism Act of 1987, which prohibits the establishment or maintenance of an office or other facility for the purpose of furthering the interests of the PLO at the direction of, or with funds provided by, the PLO. That provision of law was suspended under a waiver as provided in section 7041(l)(2)(B)(i) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017 (Div. J, P.L. 115-31). The waiver was signed on May 18, 2017 and effective for a period of no more than six months. As described in the June 22, 1994 letter, the PLO office must halt its operations following the lapse of the waiver.

The Department of State is currently reviewing the operational aspects of this matter and will provide guidance.

Sincerely,

A blue ink signature of Cliff Seagroves, consisting of stylized, overlapping loops and strokes.

Cliff Seagroves

Director, Acting

EXHIBIT 5



United States Department of State

Office of Foreign Missions

Washington, D.C. 20520

September 10, 2018

REF 18-1409

Dr. Husam Zomlot
Chief Representative
General Delegation of the Palestine Liberation Organization
1732 Wisconsin Avenue NW
Washington, DC 20007

Dear Chief Representative,

I am writing on behalf of the Department of State to follow up on our letter of November 27, 2017, in which we informed you that the waiver of statutory restrictions on Palestine Liberation Organization (PLO) activity in the United States and the office of its General Delegation in Washington, D.C., ("PLO Office") signed on May 18, 2017 had lapsed.

In that letter, we noted the priority the Administration places on achieving a comprehensive and lasting peace, and that the operations of the PLO Office should support joint efforts to facilitate direct and meaningful negotiations between the Palestinians and Israel. Accordingly, we requested the PLO Office limit its activities to those that support the objective of achieving a lasting, comprehensive peace between the Israelis and Palestinians, specifically requested the office not to undertake any new long-term commitments such as leases or contracts for employees, and noted that additional guidance would be provided as we move forward.

As time has elapsed, however, the PLO has neither engaged in direct and meaningful negotiations with Israel to achieve a comprehensive, lasting peace, nor demonstrated willingness to partner with us to make progress towards that goal. To the contrary, Palestinian leadership has condemned a peace plan it has not seen and refused to engage with the U.S. government with respect to our peace efforts and otherwise. As such, the Administration has concluded that the PLO Office is not currently engaged in activities that support the U.S. objective of achieving a lasting, comprehensive peace.

In 1994, contemporaneous with a Presidential decision to recognize positive change resulting from PLO engagement on peace by suspending prohibitions on the establishment or maintenance of a PLO Office in the United States under the Antiterrorism Act of 1987 (title X of P.L. 100-204), the Department designated the PLO Office as a foreign mission under the Foreign Missions Act (22 U.S.C. 4301-4316). At that time, and subsequently, the PLO Office has been periodically instructed as to the terms and conditions with which it must comply, and reminded

that the Department may apply additional terms and conditions from time to time as the need arises.

At this time, the Department of State requires that the PLO Office must cease operations and that benefits extended to it under the Foreign Mission Act will no longer be approved by the Department in accordance with the following schedule. The Office is instructed to cease all public operations not later than 5:00 p.m. EDT on September 13, 2018. Not later than 11:59 p.m. EDT on October 10, 2018, the PLO Office must resolve any outstanding obligations, including all its financial obligations, vacate the property located at 1732 Wisconsin Avenue, NW Washington, DC, terminate staff, and close its U.S. bank account. To this end, my office will remain your point of contact on questions regarding the mechanics of closure. We note the importance of you and your staff continuing to comply with U.S. law, including the immigration laws of the United States, and remind you that you should contact the Department of Justice with respect to any questions about the Foreign Agents Registration Act of 1938.

In addition to this notice being provided directly to you, the Department will publish a notice in the *Federal Register* advising the public of this change in the terms and conditions with respect to benefits formerly extended to the General Delegation, its agents and employees acting on its behalf.

The United States remains committed to achieving a lasting, comprehensive peace that will provide a brighter future for both Israel and the Palestinians.

Sincerely,



Cliff Seagroves
Director, Acting